Ketua Pengarah Hasil Dalam Negeri v Woodville Development Sdn Bhd

HIGH COURT (MIRI) — APPEAL NO MYY-14–1/6 OF 2012
STEPHEN CHUNG J
15 JANUARY 2013

Revenue Law — Income tax — Special Commisioners — Deciding order of Special Commisioners — Appeal against — Whether Special Commissioners correct in allowing construction costs to be deductible for tax computation — Whether Special Commissioners right in deciding market value of land — Whether Special Commissioners correct in disallowing imposition of amount of penalty under s 113(2) of the Income Tax Act 1967

This was an appeal by the appellant against the deciding order of the Special Commissioners. Briefly the facts were that the respondent had entered into a concession agreement with the Government of Sarawak ('the government') to build, operate and transfer ('BOT') a bridge over the Batang Baram, in Miri, Sarawak. As a consideration, the government agreed to alienate to the respondent 5,000 acres of land free from encumbrances and valued by the government at an estimated value of RM78,000,000; to pay to the respondent a sum of RM10,000,000; and give the respondent exclusive right for a period of 30 years to demand, collect and retain tolls for its own benefits from toll paying vehicles using the bridge. It was agreed that upon expiry of the concession agreement, the bridge would revert to the government free from all costs. The expenditures incurred in the construction of the bridge amounted to RM90,178,955. The bridge was then opened to the public and the respondent started collecting tolls from users of the bridge. The appellant then issued an additional assessment for a sum of RM17,562,082.72 for the year of assessment 2004. In 2005, the appellant filed a Form Q against the additional assessment. The appellant accepted the Form Q and forwarded it to the Special Commissioners of Income Tax ('SCIT') which then advised the respondent that the appeal had been registered. Subsequently, the respondent supplied its tax computation to the appellant in relation to the additional assessment of RM17,562,082.72. The appellant issued another notice of additional assessment for a sum of RM47,495,325.92 for the year assessment 2004 inclusive of penalties under s 113(2) of the Income Tax Act 1967 ('the Act'). In 2008, the respondent filed another Form Q against the additional assessment of RM47,495,325.92. The SCIT heard the appeals of the respondent against the additional assessments made by the appellant and decided that: apart from carrying on the toll concession business, the respondent was also engaged in the business of building the bridge; payment of RM10m and the alienation of the

land of 5,000 acres in Kuala Baram under the concession agreement to finance the costs of the bridge was a revenue receipt for the assessment of 2004 and not a subsidy or grant and should not be exempted under the Income Tax (Exemption) No 4 Order 2003; the market value of the property was RM78m as agreed under cl 11.5 of the concession agreement; the bridge construction expenses of RM90,178,955 were allowed as deductions in the computation of the business profits; the penalty of RM32,830,745.92 under s 113(2) of the Act for the 2004 assessment should not be imposed. Dissatisfied with the deciding order of the SCIT, the appellant filed the present appeal. The issues raised in this appeal were: whether the Special Commissioners were correct in allowing the construction costs of RM90,178,955 to be deductible for tax computation; whether the Special Commissioners were right in deciding that the market value of the land was RM78m as stated in the concession agreement; whether the Special Commissioners were correct in disallowing the imposition of the penalty of RM32,830,745.92 under s 113(2) of the Act.

Held, dismissing the appeal:

(1) The respondent was not entitled to the deduction under s 33(1) of the Act because it had already claimed the industrial building allowance. The case stated showed that the Special Commissioners did not allow the respondent's claim for the industrial building allowance because they ruled that the payments were revenue and not capital receipts. Instead, they allowed the construction costs of the bridge amounting to RM90,178,955 as allowable deductions in calculating the profits for the Year of Assessment 2004. This was in line with the appellant's decision in its first additional amendment where it allowed the said RM90m as deductions. It was obvious that the Special Commissioners did not allow any double deductions as the appellant had contended (see para 21).

(2) There was no reason to disturb the findings made by the Special Commissioners with regards to the valuation of the land at RM78m. Although clause 11.5(b) of the concession agreement used the word 'estimated', there was sufficient basis to support the value of the land at RM78m. Although the government entered into the concession agreement and agreed to alienate the land to the respondent, it would have made a valuation of the land (see para 25).

(3) The respondent had disclosed the receipts of the RM10m payment and the alienation of the land but these were treated as capital receipts and government grants instead of as revenue receipts. The respondent had disclosed the concession agreement, the payment of RM10m and the alienation of the land in its annual return and audited financial statements for 2002, 2003 and 2004. If the appellant had perused at the returns and audited financial statements, it knew the disclosures made by the respondents. The Special Commissioners had made these findings

and adjusted these as capital receipts and or government grants and treated them as income receipts chargeable to tax. These were therefore technical adjustments and not an incorrect return by omitting or understating any income or incorrect information relating to any matter affecting its chargeability to tax. Therefore the Special Commissioners were correct in disallowing the imposition of the penalty under s 113(2) of the Act. There was no merit on this point in the appeal (see para 40).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap perintah keputusan Pesuruhjaya Khas. Secara ringkas faktanya adalah responden telah memasuki perjanjian konsesi dengan Kerajaan Negeri Sarawak ('kerajaan negeri') untuk membina, melaksana dan memindah ('BOT') sebuah jambatan merentas Batang Baram di Miri, Sarawak. Sebagai balasan, kerajaan negeri bersetuju untuk memberi milik kepada responden 5,000 ekar tanah yang bebas daripada sekatan dan dinilai oleh kerajaan negeri pada nilai anggaran RM78,000,000; untuk membayar kepada responden sejumlah RM10,000,000; dan memberikan responden hak eksklusif untuk tempoh 30 tahun untuk menuntut, mengutip dan mengekalkan tol-tol bagi faedahnya sendiri daripada kenderaan-kenderaan yang membayar tol yang menggunakan jambatan itu. Adalah dipersetujui bahawa setelah luput perjanjian konsesi, jambatan itu akan kembali kepada kerajaan negeri bebas daripada semua kos. Perbelanjaan yang ditanggung dalam pembinaan jambatan berjumlah RM90,178,955. Jambatan itu kemudian dibuka kepada pihak awam dan responden memulakan kutipan tol daripada pengguna jambatan itu. Perayu kemudian mengeluarkan taksiran tambahan berjumlah RM17,562,082.72 bagi tahun taksiran 2004. Pada tahun 2005, perayu telah memfailkan Borang Q terhadap taksiran tambahan itu. Perayu menerima Borang Q dan kemudian mengemukakannya kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') yang kemudian menasihatkan responden bahawa rayuan telahpun didaftarkan. Berikutan itu, responden telah memberikan pengiraan cukainya kepada perayu berkaitan taksiran tambahan RM17,562,082.72. Perayu telah mengeluarkan satu lagi notis taksiran tambahan berjumlah RM47,495,325.92 bagi tahun taksiran 2004 termasuklah penalti-penalti di bawah s 113(2) Akta Cukai Pendapatan 1967 ('Akta tersebut'). Pada tahun 2008, responden telah memfailkan satu lagi Borang Q terhadap taksiran tambahan berjumlah RM47,495,325.92. PKCP telah mendengar rayuan-rayuan responden terhadap taksiran tambahan yang dibuat oleh perayu dan diputuskan bahawa: selain daripada menjalankan perniagaan konsesi tol, responden juga terlibat dalam perniagaan pembinaan jambatan; bayaran RM10 juta dan pemberimilikan tanah 5,000 ekar di Kuala Baram di bawah perjanjian konsesi untuk membiayai kos jambatan adalah penerimaan hasil untuk taksiran 2004 dan bukan subsidi atau geran dan tidak patut dikecualikan di bawah Cukai Pendapatan (Pengecualian) (Bil 4) Perintah 2003; nilai pasaran hartanah adalah RM7.8 juta sepertimana dipersetujui di bawah fasal 11.5 perjanjian konsesi; perbelanjaan pembinaan jambatan

berjumlah RM90,178,955 telah dibenarkan sebagai potongan dalam pengiraan keuntungan perniagaan; penalti berjumlah RM32,830,745.92 di bawah s 113(2) Akta tersebut untuk taksiran 2004 tidak patut dikenakan. Berasa tidak puas hati dengan perintah keputusan PKCP, perayu telah memfailkan rayuan ini. Isu-isu yang ditimbulkan dalam rayuan ini adalah: sama ada Pesuruhjaya Khas adalah betul membenarkan kos pembinaan RM90,178,955 ditolak daripada pengiraan cukai; sama ada Pesuruhjaya Khas adalah betul dalam memutuskan bahawa nilai pasaran tanah itu adalah RM78 juta sebagaimana dinyatakan dalam perjanjian konsesi; sama ada Pesuruhjaya Khas adalah betul dengan tidak membenarkan pengenaan penalti berjumlah RM32,830,745.92 di bawah s 113(2) Akta tersebut.

Diputuskan, menolak rayuan:

(1) Responden tidak berhak mendapat potongan di bawah s 33(1) of the Akta tersebut kerana ia telahpun menuntut elaun pembinaan industri. Kes yang dinyatakan menunjukkan bahawa Pesuruhjaya Khas tidak membenarkan tuntutan responden untuk elaun pembinaan industri kerana mereka memutuskan bahawa bayaran-bayaran itu merupakan hasil dan bukan penerimaan modal. Sebaliknya, mereka dibenarkan kos pembinaan jambatan berjumlah RM90,178,955 sebagai potongan yang dibenarkan dalam mengira keuntungan bagi Taksiran Tahun 2004. Ini adalah sejajar dengan keputusan perayu dalam pindaan tambahan pertamanya di mana ia membenarkan RM90 juta sebagai potongan. Adalah nyata bahawa Pesuruhjaya Khas tidak membenarkan apa-apa potongan berganda sebagaimana yang dihujahkan oleh perayu (lihat perenggan 21).

(2) Tiada sebab untuk mengganggu penemuan yang dibuat oleh Pesuruhjaya Khas berhubung penilaian tanah berjumlah RM78 juta. Walaupun fasal 11.5(b) perjanjian konsesi menggunakan perkataan 'estimated', terdapat asas yang mencukupi untuk menyokong nilai tanah berjumlah RM78 juta. Walaupun kerajaan memasuki perjanjian konsesi dan bersetuju untuk memberi milik tanah kepada responden, ia boleh membuat penilaian ke atas tanah (lihat perenggan 25).

(3) Responden telah mengemukakan penerimaan-penerimaan bayaran RM10 juta dan pemberi milikan tanah tetapi ia telah dianggap sebagai penerimaan-penerimaan modal dan geran kerajaan negeri dan bukan penerimaan-penerimaan hasil. Responden telah mengemukakan perjanjian konsesi, bayaran RM10 juta dan pemberi milikan tanah dalam penyata tahunannya dan penyata kewangan yang diaudit bagi tahun 2002, 2003 dan 2004. Jika perayu telah meneliti penyata-penyata tahunan dan kewangan yang diaudit, ia tentu mengetahui pendedahan yang dibuat oleh responden-responden. Pesuryhjaya Khas telah membuat penemuan dan menyesuaikannya sebagai

penerimaan-penerimaan modal dan atau geran kerajaan negeri dan menganggap yang berikut sebagai penerimaan pendapatan yang dikenakan cukai. Oleh itu ianya adalah penyesuaian teknikal dan bukan hasil yang tidak betul dengan meninggalkan atau kurang menyatakan apa-apa pendapatan atau maklumat yang tidak betul berkaitan apa-apa perkara yang menjejaskan cukai yang boleh dikenakan ke atasnya. Oleh itu Pesuruhjaya Khas adalah betul dengan tidak membenarkan penalti di bawah s 113(2) Akta tersebut. Tiada merit berhubung perkara ini dalam rayuan tersebut (lihat perenggan 40).]

Notes

For cases on Special Commissioners, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2660–2662.

Cases referred to

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235, PC (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 540, SC (not folld)

Legislation referred to

Income Tax Act 1967 ss 4(a), 33(1), 91(1), 113(2), Schedule 3 para 67A, Schedule 5 para 34, Forms C, Q

Income Tax (Exemption) (No 4) Order 2003

Norhisham bin Ahmad (Shaqirul Ifzam bin Shohime with him) (Inland Revenue Board of Malaysia) for the appellant.

MS Sandhu (Sandhu & Co Advocates) for the respondent.

Stephen Chung J:

[1] This is an appeal by the above appellant against the deciding order of the Special Commissioners given on 6 December 2011 by way of a case stated under para 34 of Schedule 5 of the Income Tax Act 1967.

[2] At the hearing before the Special Commissioners, the parties submitted a statement of agreed factss. From the statement of agreed factss, the respondent had entered into a concession agreement with the Government of Sarawak to build, operate and transfer ('BOT') a bridge over the Batang Baram, in Miri Division, Sarawak. In consideration of the respondent undertaking the BOT works, the government agreed to:

(a) alienate to the respondent 5,000 acres of land free from encumbrances and valued by the Sarawak Government at an estimated value of RM78,000,000;

(b) pay to the respondent a sum of RM10,000,000 in the manner specified in cl 11.15(c) of the concessions agreement; and

(c) give to the respondent exclusive right for a period of 30 years to demand, collect and retain tolls for its own benefits from toll paying vehicles using the bridge.

[3] The statement of agreed factss further stated that upon expiry of the concession agreement, the bridge shall revert to the Government of Sarawak free from all costs. The expenditures incurred in the construction of the bridge amounted to RM90,178,955. On 31 August 2003, the bridge was opened to the public. On 1 September 2003, the respondent started to collect tolls from users of the bridge.

[4] On 31 October 2005, the appellant issued an additional assessment for a sum of RM17,562,082.72 for the year of assessment 2004. On 28 November 2005, the appellant filed a Form Q against the additional assessment. The appellant accepted the Form Q and forwarded it to the Special Commissioners of Income Tax ('SCIT'). On 11 December 2006, the office of the SCIT wrote to the respondent advising that the appeal had been registered as PKCP (R) 56/2006. On 15 November 2005, the respondent supplied its tax computation to the appellant in relation to the additional assessment of RM17,562,082.72.

[5] On 23 July 2008, the appellant issued another notice of additional assessment for a sum of RM47,495,325.92 for the year assessment 2004 inclusive of penalties under s 113(2) of the Act 1967. On 18 August 2008, the respondent filed another Form Q against the additional assessment of RM47,495,325.92. By a letter dated 2 June 2009, the office of the SCIT informed the appellant that the appeal was registered as PKCP (R) 23/2009. On 30 July 2009, the SCIT ordered the consolidation of *Rayuan No* PKCP (R) 56/2006 and *Rayuan No* PKCP (R) 23/2009.

[6] On 6–7 April 2010, the SCIT heard the appeals of the respondent against the additional assessments made by the appellant. The documents and exhibits referred to are as stated in para 5.1 of the case stated.

[7] The SCIT gave their decisions on 6 December 2011. They set out the issues to be addressed as follows:

(a) whether the respondent carried on the business of bridge construction and whether the payment of RM10m and the alienation of 5,000 acres of the land under the agreement dated 18 September 2000 from the state government in return for the construction of the bridge over Batang Baram and to collect toll after the completion constitute a capital or revenue income for the year of assessment 2004;

(b) if the receipts were taxable under s 4(a) of the Act, whether it was exempted from income tax under the Income Tax (Exemption) (No 4) Order 2003;

(c) what was the correct market value of the land for tax computation for the year of assessment 2004; and

(d) whether the appellant had correctly imposed the penalty of RM32,830,745.92 under s 113(2) of the Act.

[8] The deciding order dated 6 December 2011 were in the following terms:

(a) that apart from carrying on the toll concession business, the above respondent was also engaged in the business of building the bridge;

(b) that the payment of RM10m and the alienation of the land of 5,000 acres in Kuala Baram under the concession agreement dated 18 September 2000 to finance the costs of the bridge was a revenue receipt for year of assessment 2004 and not a subsidy or grant and should not be exempted under the Income Tax (Exemption) (No 4) Order 2003;

(c) that the market value of the property was RM78m as agreed under cl 11.5 of the concession agreement;

(d) that the bridge construction expenses of RM90,178,955 were allowed as deductions in the computation of the business profits; and

(e) that the penalty of RM32,830,745.92 under s 113(2) of the Income Tax Act 1967 for the year of assessment 2004 should not be imposed.

[9] The appellant being not satisfied with the deciding order of the SCIT has filed this appeal by way of the case stated. The issues in this appeal as set out by the appellant are:

(a) whether the Special Commissioners were correct in allowing the construction costs of RM90,178,955 to be deductible for tax computation;

(b) whether the Special Commissioners were right in deciding that the market value of the land was RM78m as stated in the concession agreement; and

(c) whether the Special Commissioners were correct in disallowing the imposition of the penalty of RM32,830,745.92 under s 113(2) of the Act.

[10] The appellant submitted that in an appeal the onus is at all material times on the taxpayer to satisfy the Special Commissioners that the assessments were wrong or should be set aside. The appellant cited the case of *Lower Perak*

Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 540 in support of its submission.

[11] With respect, I am unable to agree with the submission that the burden is on the respondent in this appeal. In that decision, it was held that in an appeal by a taxpayer to the Special Commissioners against an assessment made under the Act, the onus was on the taxpayer to show that the assessment was wrong and it was held that the taxpayer undertook the same onus when he brought a further appeal to the High Court or to the Court of Appeal. I agree that the respondent had the onus to show that the assessment was wrong before the SCIT. In this case stated, however, the appeal is brought by the appellant and not by the taxpayer or the respondent. The appellant therefore undertakes the onus that the decisions of the Special Commissioners on the questions of law raised were wrong.

[12] The facts in this appeal are as follows. The appellant raised the first additional assessment dated 31 October 2005 for RM17,562,082.72 because the respondent purportedly failed to declare an income of RM154,882,500 which comprised the payment of the RM10m and the alienation of the land from the Sarawak Government. The appellant in this additional assessment had valued the land as at October 2000 at RM144,882,500. In this assessment, the appellant had allowed RM90,000,000 being the costs of the bridge construction as allowable deductions. Hence, the income which the respondent had failed to declare was assessed at RM64,882,500, with a tax rate of 28% less tax paid on 5 February 2005, leaving the balance of RM17,562,082.72 to be paid by the respondent.

[13] Subsequently, the appellant decided to amend the first additional assessment via the second additional assessment dated 23 July 2008. In this amended assessment, the land was valued at only RM107,256,000 instead of at RM144,882,500. The appellant also decided to withdraw the deduction of RM90,000,000 previously given and instead allowed the industrial building allowance.

[14] According to the second additional assessment, the respondent had failed to declare an income of RM117,252,664 and tax was assessed at RM32,830,745.92. The appellant exercised its discretion to impose the penalty of an equivalent amount of RM32,830,795.92 under s 113(2) of the Act. These added to the amount of RM65,661,491.84 less the sum of RM18,166,165.92 under the first additional assessment. The additional tax payable after the amendments was RM47,495,325.92.

[15] The first issue is whether the Special Commissioners were correct in allowing the construction costs of RM90,178,955.00 to be deductible for tax

computation. The appellant submitted that the Special Commissioners had erred in law and in fact in deciding that the costs of RM90,178,955 were allowed as deductions under s 33(1) of the Act. It was submitted that the sole reason why the taxpayer was not entitled to the deduction under s 33(1) was because the taxpayer had already claimed the industrial building allowance under Schedule 3 of the Act. It was submitted that this had been confirmed by a witness of the respondent that the capital allowance had been claimed by the respondent.

[16] It was submitted that under revenue law only one item is allowed as deduction either under s 33(1) of the Act or as industrial building allowance under Schedule 3 of the Act. The appellant submitted that since the respondent had claimed the industrial building allowance, the deduction under s 33(1) should not have been allowed and that the decision of the Special Commissioners in allowing the costs of RM90,178,955 as deductions under s 33(1) amounted to double deductions and was wrong in law.

[17] I find that there is no merit on this ground of appeal by the appellant. The respondent submitted that its business under the concession agreement was as a toll concessionaire only. The case stated showed that the respondent did not consider itself in the business of building bridges and had accordingly treated the payment of the RM10m and the alienation of the 5,000 acres of land as capital receipts and included as property, not as revenue receipts for the construction of the bridge. The respondent argued was that it was in the business of a toll concessionaire only which commenced on 1 September 2003 after the bridge was completed and open for use. The respondent submitted that because the payment of the RM10m and the alienation of the land were capital receipts, it claimed the industrial building allowance under para 67A of Schedule 3 of the Act.

[18] In their grounds of decisions, the Special Commissioners found on the facts before them that the respondent, apart from carrying on the business of a toll concession, was also engaged in the business of building the bridge. There was ample evidence to support the Special Commissioner's finding. The Special Commissioners found that the payment of the RM10m and the alienation of the land in Kuala Baram by the Sarawak Government under the concession agreement were therefore revenue receipts for the year of assessment 2004. The Special Commissioners also found that these were not subsidies or grants paid by the Sarawak Government and were therefore not exempted under the Income Tax (Exemption) (No 4) Order 2003.

[19] The appellant submitted that the findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplanted by the High Court in a case stated: *Chua Lip Kong v*

Director-General of Inland Revenue [1982] 1 MLJ 235. In this appeal, the appellant did not challenge the findings of the Special Commissioners that the respondent was also in the business of building the bridge and that the payment of the RM10m and the alienation of the 5,000 acres of land were revenue receipts and not capital receipts for the year of assessment 2004.

[20] Since the Special Commissioners found on the facts that the respondent was in the business of building the bridge and the payment of RM10m and the alienation of the land were revenue receipts, they allowed the costs of RM90m incurred to build the bridge as outgoings and expenses wholly and exclusively incurred for the year of assessment 2004. The appellant had in the first additional assessment treated the said RM90m as expenses and allowable deductions. However, the appellant did not give any explanation why it decided to amend the first additional assessment in not allowing the RM90m as deduction.

[21] The 'sole reason' (to use the words of the appellant) submitted by the appellant why the respondent was not entitled to the deduction under s 33(1) was because it had already claimed the industrial building allowance. The case stated showed that the Special Commissioners did not allow the respondent's claim for the industrial building allowance because they ruled that the payments were revenue and not capital receipts. Instead, they allowed the construction costs of the bridge amounting to RM90,178,955 as allowable deductions in calculating the profits for the year of assessment 2004. This was in line with the appellant's decision in its first additional amendment where it allowed the said RM90m as deductions. It was obvious that the Special Commissioners did not allow any double deductions as the appellant had contended.

[22] The second issue is whether the Special Commissioners was correct in assessing the land at RM78m. On the market value of the land, the appellant referred to the three different valuations of the land canvassed before the Special Commissioners. The state government had estimated the land at RM78m in the concession agreement. The City Valuers & Consultant Sdn Bhd had valued the land at RM72,734,094 and JPPH had valued it at RM107,256,000.

[23] The appellant submitted that RM78m was not the market value but only an estimated value of the land. It highlighted that the word 'estimated' is used in the concession agreement. The appellant farther submitted that none of the valuers from the Lands and Surveys Department were called to testify and to confirm that the market value of the land was RM78m. It was submitted that the failure to call the valuers from the Lands and Surveys Department was fatal to the respondent's case as the burden of proof in tax cases is on the taxpayer.

[24] The appellant contended that it was at liberty to use the best judgment to substitute the valuation made by the Lands and Surveys Department and the valuation by City Valuers & Consultant Sdn Bhd instead used the valuation made by JPPH pursuant to s 91(1) of the Act. Hence, it submitted that the second additional amendment was proper and correct.

[25] With respect, there is no reason to disturb the findings made by the Special Commissioners with regards to the valuation of the land at RM78m. Although cl 11.5(b) of the concession agreement used the word 'estimated', there was sufficient basis to support the value of the land at RM78m. Although the Sarawak Government entered into the concession agreement and agree to alienate the land to the respondent, it would have made a valuation of the land.

[26] Clause 23.2(c) of the concession agreement provided that the land would only be alienated to the respondent after it had furnished to the state government a corporate guarantee for an amount equivalent to the market value of the land in its existing state. For that purpose, the respondent had instructed City Valuers to determine the market value of the land as at October 2000. At that time, the land had not been alienated to the respondent and it was still state land. It had not been zoned nor classified as either industrial, commercial or mixed zone land. The other parcels of land in the vicinity were for industrial use.

[27] The Sungai Baram cut across the several parcels of land to be alienated so that some are situated on the southern bank of the river, on the Miri side, and accessible by road and some are situated on the northern bank of the river, on the Sungei Tujuh side near to the Brunei border, which were not accessible by road. City Valuers valued those parcels on the Miri side at RM49,400 per hectare but valued the parcels on the Sg Tujuh side at only RM24,700 per hectare. City Valuers valued the 5,000 acres of land at RM72,734,090. This was lower than the RM78m valued by the state government.

[28] In contrast, JPPH valued the land at RM144,882,500 as at October 2000 and at RM155,231,250 as at September 2003. In determining to the valuations, JPPH used five comparables, which were listed in para 10 of the valuation report (see pp 6–24 of bundle of appeal documents marked as C3), to determine market value of the 5,000 acres of land.

[29] However, these five parcels of land were not suitable to be used as comparables. No reason was given why it chose the five parcels of land on the other side of Miri city, near to Miri Airport, more than 10km from the subject land, and which were in residential and commercial areas. The comparables were mixed zone land. The subject land at the material time was quite isolated

and swampy, especially those parcels at the Sg Tujuh side. It was therefore erroneous for JPPH to value the subject land at RM70,000 per hectare.

[30] In its second valuation, carried out on 7 July 2008, which was the basis for the second additional assessment, JPPH valued the land at RM107,256,000 as at October 2005. It was a big difference from the previous valuation of RM144,882,500. JPPH explained, inter alia, that the previous valuation was based on an inaccurate description of the land in respect of the bridges, roads and the physical aspect of the land. The assessment used in the previous valuation was not proper because the adjustment made was very minimal and that there were no suitable comparable lands in the vicinity of the subject land to make a proper valuation.

[31] JPPH then decided to use the valuation made by the Lands and Surveys Department, Miri at RM48,000 per hectare to value the land alienated. The report went on to say that this valuation was comparable to the valuation at RM49,400 per hectare made by City Valuer.

[32] JPPH assessed the land in deciding to pluck the figure at RM48,000 per hectare and depend on a previous valuation made by the Lands and Surveys Department, Miri. The appellant fell into its own trap for criticising the respondent for not calling the valuers from the Lands and Surveys Department to testify and confirm the market value of the land.

[33] The concession agreement entered into between the Sarawak Government and the respondent was at arms length. Therefore, it was correct for the Special Commissioners to accept the valuation of RM78m for the land made by the Sarawak Government. The Sarawak Government, being the owner of the land, was in the best position to value the land via its various agencies and or departments. There is no merit on this point.

[34] The last issue is whether the appellant was correct in imposing the penalty under s 113(2) of the Act. It was submitted that where a person makes an incorrect return by omitting or understating any income or gives any incorrect information in relation to any matter affecting his chargeability to tax, the director general may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information has been accepted as correct.

[35] The appellant submitted that the penalty of RM32,830,745.90 was correctly imposed on the respondent. It submitted that the appellant only knew about the existence of the concession agreement after it visited the respondent's premises. It submitted that the respondent knew how much

income it received from the business but had furnished an incorrect return by failing to disclose all the proceeds received under the concession agreement. It was submitted that the penalty imposed by the appellant was not due to any technical adjustment but that the respondent had failed to declare the income received pursuant to the concession agreement.

[36] The appellant submitted that it was the absolute discretion to impose the penalty under sub-s 113(2) of the Act after considering all relevant facts and circumstances.

[37] In coming to the decision that the imposition of the penalty under s 113(2) of the Act was not justifiable, the Special Commissioners were of the opinion that some leeway should be given in a case of self assessment. They asked whether a taxpayer should be penalised when it was discovered by the tax authority during an audit or investigation that certain documents have not been submitted when they were not required to be submitted during the submission of the tax return. In this case, the Special Commissioners specifically referred to the concession agreement which the appellant submitted it only came to know after it visited the respondent's premises.

[38] I refer to Form C for year of assessment 2002–2004 and the respective audited financial statements for those years which were exhibits in the appeal bundle of documents marked as C2. In the audited financial statements for the year ended 30 June 2002, the respondent had referred to and disclosed the concession agreement dated 18 September 2000 in Note 6 'Capital Work in Progress' (see p 564 of C2). It stated that the company was granted the right and authority to construct, maintain, operate and collect tolls on the bridge for a period of 30 years. The respondent stated that it was principally engaged in the construction, operation and maintenance of a bridge, and collection of toll from road users of the bridge. The appellant did not ask for a copy of the concession agreement.

[39] In its audited financial statements for the year ended 30 June 2004, the respondent had referred to and disclosed the cash payments from the state government of RM10m and the alienation of the land valued at RM78m in Note 8 under the heading 'Property, Plant and Equipment' (see p 615 of C2). The respondent treated these, rightly or wrongly, as capital receipts and government grants. It treated the costs of construction of the bridge and assess road as capital work in progress and the government grants received relating to the infrastructure assets were deducted from the costs of the constructions. The facts showed that the respondent in this appeal had disclosed the receipts of the RM10m payment and the alienation of the land but these were treated as capital receipts and government grants instead of as revenue receipts.

[40] The respondent had disclosed the concession agreement, the payment of RM10m and the alienation of the land in its annual return and audited financial statements for 2002–2004. If the appellant had perused at the returns and audited financial statements, it knew the disclosures made by the respondents. The Special Commissioners had made these findings and adjusted these as capital receipts and or government grants and treated them as income receipts chargeable to tax. These were therefore technical adjustments and not an incorrect return by omitting or understating any income or an incorrect information relating to any matter affecting its chargeability to tax. Therefore the Special Commissioners were correct in disallowing the imposition of the penalty under s 113(2) of the Act. There is no merit on this point in the appeal.

[41] For the reasons given, there are no merits in this appeal and the same is dismissed with costs of RM5,000 to be paid to the respondent.

Appeal dismissed.

Reported by Afiq Mohamad Noor